

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, <u>et al.</u> , |) | |
| |) | No. 1:96CV01285 |
| Plaintiffs, |) | (Judge Lamberth) |
| v. |) | |
| |) | |
| GALE A. NORTON, Secretary of |) | |
| the Interior, <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER REGARDING PLAINTIFFS'
REQUEST FOR PRODUCTION OF MMS AUDIT DOCUMENTS AND
PLAINTIFFS' NOTICES OF DEPOSITION OF DEBORAH GIBBS TSCHUDY
AND LONNIE J. KIMBALL WITH REQUEST FOR PRODUCTION OF DOCUMENTS
AND
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
AND REQUEST FOR SANCTIONS PURSUANT TO RULE 37**

On October 29, 2003, Defendants moved for a protective order regarding Plaintiffs' document requests and deposition notices inquiring into the September 26, 2003, ex parte site visit and related Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service ("Report"). For the reasons stated in Defendants' opening memorandum, as well as below, Defendants respectfully request that the Court enter a protective order and deny Plaintiffs' Motion to Compel and Request for Sanctions.

Background

On October 1, 2003, Plaintiffs sent a letter to Defendants' counsel containing requests for production of Minerals Management Service ("MMS") Audit files ("Request for MMS Audit Documents"); on October 17, 2003, Plaintiffs served a Notice of Deposition of Deborah Gibbs Tschudy and Request for Production of Documents ("Gibbs Tschudy Deposition Notice"); and on October 20, 2003, Plaintiffs served a Notice of Deposition of Lonnie J. Kimball and Request for Production of Documents ("Kimball Deposition Notice") (collectively referred to as "Discovery Regarding the Special Master's Site Visit"). On October 29, 2003, Defendants filed a Motion for a Protective Order regarding the foregoing requests ("Motion for Protective Order").¹ On November 12, 2003, Plaintiffs filed their opposition to Defendants' Motion for Protective Order in a consolidated filing that included a Motion to Compel and Request for Sanctions Pursuant to Rule 37 ("Opposition"). This filing constitutes Defendants' Reply in Support of their Motion for a Protective Order as well as Defendants' Opposition to Plaintiffs' Motion to Compel and Request for Sanctions Pursuant to Rule 37.²

I. Defendants' Motion For Protective Order Should Be Granted And Plaintiffs' Motion To Compel Should Be Denied.

A. No Discovery Is Authorized At This Time

In the Motion for Protective Order, Defendants demonstrate that a protective order from Plaintiffs' Discovery Regarding the Special Master's Site Visit is warranted because under the

^{1/} See Defendants' Motion for Protective Order Regarding Plaintiffs' Request For Production of MMS Audit Documents And Plaintiffs' Notices of Deposition of Deborah Gibbs Tschudy and Lonnie J. Kimball With Requests For Production Of Documents (filed Oct. 29, 2003).

^{2/} Defendants have also filed responses to each of Plaintiffs' document requests pursuant to Rule 34(b) (attached as Exhibits 1, 2, and 3).

Federal Rules of Civil Procedure all discovery is currently unauthorized in this case. See Motion for a Protective Order at 2-3. In their Opposition, Plaintiffs claim that discovery is authorized and incorporate by reference their previous arguments that this Court's September 17, 2002 Order granted them "full discovery" rights. See Opposition at 6. Plaintiffs contend that the September 17, 2002 Order granted them unending discovery rights. Opposition at 6 n.7 (incorporating prior arguments to that effect). There is no basis for their contention.

The September 17 Order merely restored the usual discovery rights that had been denied Plaintiffs by a previous order. After entry of the September 17 Order, Plaintiffs were in the same position as any other litigant with regard to their discovery rights. On October 17, 2002, the Court signed a Phase 1.5 discovery scheduling order. See Phase 1.5 Discovery Schedule Order (October 17, 2002) (attached as Exhibit 4). Pursuant to that Order, fact discovery closed on March 24, 2003,³ and all discovery terminated on April 10, 2003. Plaintiffs do not, and cannot, explain how the September 17 Order granted them discovery rights that exceed the limits established by the Court's scheduling order. There is no other order granting Plaintiffs the right to take discovery and Plaintiffs cite none in their Opposition.

Plaintiffs are also bound by the Federal Rules, which forbid discovery prior to a Rule 26(f) planning conference, as described in the Motion for Protective Order.⁴ See Fed. R. Civ. P.

³ The close of fact discovery was subsequently extended by the Special Master-Monitor until March 28, 2003.

⁴ One exception to this prohibition is that Rule 27(b) permits a district court to allow, upon motion that sets forth certain prescribed information, the taking of depositions of witnesses to perpetuate testimony "for use in the event of further proceedings in the district court," pending appeal of a judgment. Fed. R. Civ. P. 27(b). Plaintiffs have not filed any such motion to take Ms. Gibbs Tschudy's or Mr. Kimball's depositions and therefore, have obviously not met the requirements of Rule 27.

26(d). The parties have not held a discovery planning conference on any subsequent proceeding in this case. Therefore, discovery has not commenced on any subsequent proceedings and Plaintiffs are precluded from requesting documents and noticing depositions without leave of Court. Id.; Fed. R. Civ. P. 30(a)(2)(C).

To the extent Plaintiffs contend in their Opposition that they have the right to discovery on "institutional reform ordered by this Court on September 25, 2003," see Opposition at 6 n.7, they fail to cite any language in the Court's September 25, 2003 Orders or structural injunction granting Plaintiffs discovery rights. Moreover, the Court's structural injunction was administratively stayed by the Court of Appeals on November 12, 2003, so it cannot provide a basis for the untimely new requests served by Plaintiffs.

B. Neither The Special Master's Ex Parte Site Visit Nor His Report, Which The Court Has Not Adopted, Provide Any Basis For Discovery

The Special Master's September 26, 2003, ex parte site visit to the Dallas MMS Office and related Report provide no independent basis for the Plaintiffs to take discovery. As set forth in Defendants' opening brief, Plaintiffs rely on the Special Master's Report as a predicate for their discovery into the Special Master's site visit and Report, even though the Court has not adopted the Report and Interior Defendants filed a response and objection to that Report on October 16, 2003. See Motion For Protective Order at 4. Plaintiffs' Opposition only confirms their misplaced reliance on the Report as the basis for their discovery:

Plaintiffs["] discrete discovery requests are designed to obtain evidence that more fully exposes the nature and scope of Norton's continuing malfeasance, including without limitation evidence related to the Master's preliminary findings that violations of law and court orders as well as breaches of trust continue to plague

Norton's management and administration of the Individual Indian Trust.

Opposition at 4. Plaintiffs incorrectly characterize the Special Master's Report as "incontestible," and then apparently conclude, without citing any authority, that the Report somehow grants them discovery rights. Id. at 3. To the contrary, a master's report consists of recommendations that can always be contested by the parties pursuant to Rule 53 and the Court may choose to adopt or reject any findings in the report or recommit the matter to the master.⁵ Fed R. Civ. P. 53(e)(2). The Court has neither adopted or rejected any findings in the Report. Regardless, discovery rights do not spontaneously generate because the Special Master has filed a Report and Defendants filed a response. Discovery is closed, and the Court has not ordered additional discovery at this time.

Plaintiffs argue further that discovery is warranted because Interior Defendants are purportedly "prevent[ing] the Master from uncovering additional evidence[.]" Opposition at 2. To the contrary, Defendants are not preventing the Special Master from conducting site visits; indeed, they expressly informed him that they do not object to his conducting site visits, provided that they are conducted inter partes and with notification to counsel. See Letter from Sandra P. Spooner, Deputy Director, Civil Division, Department of Justice, to Alan L. Balaran, Special Master dated September 30, 2003 (attached as Exhibit 5). Therefore, Plaintiffs have no basis to

⁵ Interior Defendants have objected to the Report in its entirety pursuant to Rule 53(e)(2). See Interior Defendants' Response and Objection To The Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (filed October 16, 2003). Plaintiffs filed no Rule 53 response.

assert that Defendants are preventing the Special Master from "uncovering additional evidence," and their erroneous assertion cannot serve as a pretext for discovery.⁶

Plaintiffs do not dispute that the Special Master conducted his site visit ex parte or that Interior Defendants' request that he terminate his site visit was accompanied by a phone message from Defendants' counsel requesting that he conduct his site visits inter partes. Motion for Protective Order at 3. Instead, Plaintiffs' Opposition simply assumes that the Special Master had the authority to conduct his site visit ex parte but fails to cite any order of the Court or provision in Rule 53 permitting the Special Master to conduct ex parte site visits or extra-record proceedings that exclude Defendants' counsel. In any event, Plaintiffs fail to explain how the Special Master's investigatory conduct entitles them to discovery.

C. The Nature And Scope of Plaintiffs' Document Requests Are Objectionable

Even if discovery were authorized, the nature and scope of Plaintiffs' discovery requests are objectionable under Rule 26. See Motion for Protective Order at 7-10. Defendants attached the Gibbs Tschudy Declaration to the Motion for Protective Order to demonstrate that certain of Plaintiffs' document requests would impose undue burden and expense on Defendants. See Motion for a Protective Order at Exhibit 4. In their Opposition, however, Plaintiffs fail to even address any of the facts in the declaration, but instead, attack the credibility of Ms. Gibbs Tschudy, adding their usual invectives and culminating in a request for her confinement.⁷ See Opposition at 6-8 (accusing Ms. Gibbs Tschudy of an "attempt to materially mislead this Court

⁶ Even assuming arguendo the Special Master had been improperly denied access to conduct site visits, that fact does not call for or give license to Plaintiffs to conduct discovery.

⁷ Part II below addresses the lack of any legal justification for Plaintiffs' request that Ms. Gibbs Tschudy and others be confined.

and the plaintiffs"). Similarly, Plaintiffs fail to address how their requests for the personnel files of Ms. Gibbs Tschudy and Mr. Kimball, as well as all individuals under their supervision, seek relevant information that is reasonably calculated to lead to the discovery of admissible evidence and have not been propounded to simply subject individuals to undue "oppression," "annoyance" and "embarrassment."⁸ See Motion for Protective Order at 7-8.

In addition, Plaintiffs are requesting categories of documents that, if they exist, are protected by the attorney client privilege or the work product doctrine, notwithstanding the Court's opinions on the fiduciary exception. See Motion for Protective Order at 9-10. Plaintiffs fail to rebut Defendants' argument on this issue. Opposition at 6-7, 9-10. Defendants seek protection from certain of Plaintiffs' document requests attached to the Gibbs Tschudy and Kimball deposition notices because, on their face, those requests seek documents relating solely to the Special Master's conduct as a judicial official. Such documents, if they exist, are not the type of documents that would relate to the administration of the IIM trust, but would be purely litigation related. Plaintiffs fail to articulate any basis for the Court to conclude otherwise. Instead, Plaintiffs demand a privilege log, see Opposition at 9, but their request for a privilege log is premature. In the event the Court orders discovery to go forward, Defendants will provide a privilege log for documents withheld on the basis of privilege.

⁸ Plaintiffs also completely ignore the numerous objections raised by Defendants in their responses to Plaintiffs' Request for MMS Audit Documents. Moreover, with regard to document requests attached to the Kimball and Gibbs Tschudy Deposition Notices, Plaintiffs filed their Motion to Compel well before Defendants were even required to respond, and did respond, to them; thus, they apparently made the decision to move to compel production of documents before considering those responses and objections.

In sum, good cause exists for a protective order preventing Plaintiffs' Discovery Regarding the Special Master's Site Visit: (1) discovery is not authorized at this time; (2) the Special Master's Report provides no independent basis for discovery; and (3) the unreasonable and improper nature of certain of the requests warrant protection. Therefore, Defendants' Motion for a Protective Order should be granted and Plaintiffs' Motion to Compel should be denied.

II. Plaintiffs Have Failed to Establish Any Basis For Their Request For Monetary Sanctions And Confinement

A. Defendants' Objections to Discovery At This Time Are Substantially Justified

Plaintiffs request attorney fees and costs pursuant to Rule 37(a)(4)(A) for what they claim is the "unjustified refusal of Norton and Martin to produce the aforementioned documents and privilege logs[.]" Opposition at 11. However, as set forth fully in the Motion for Protective Order and in section I, above, Defendants filed their motion and have not produced the requested documents because discovery is closed, and Plaintiffs' discovery is unauthorized under Rule 26. In addition, Defendants have served specific responses and objections to each of Plaintiffs' various document requests. (Exhibits 1, 2, and 3).

Similarly, Plaintiffs' contention that Defendants were required to serve a privilege log at this time is without merit. Opposition at 9. Plaintiffs apparently assume, incorrectly, that discovery is open, that Defendants are otherwise required to produce documents, and that Defendants are withholding particular documents based on an assertion of privilege. Id. To the contrary, discovery is closed, and, for that reason, Defendants have no obligation to produce documents in response to Plaintiffs' improper discovery demands. Defendants have not yet

asserted privilege with respect to any particular document. Accordingly, a privilege log would be premature. In the event that discovery is opened and Defendants assert privilege with respect to particular documents, a privilege log will be provided.

B. Defendants Have Not Violated The August 12, 1999 Order

Plaintiffs request that the Court enter an order "confining Gale Norton, Sandra Spooner and Deborah Gibbs Tschudy until full compliance is achieved with this Court's August 12, 1999 Consent Order." Opposition at 11. However, Plaintiffs fail to provide any basis for the Court to conclude that Defendants are not complying with the August 12, 1999 Order. Defendants have specifically informed the Special Master that they do not object to site visits authorized by and performed in accordance with the August 12, 1999 Order. See Letter from Sandra P. Spooner, Deputy Director, Civil Division, Department of Justice, to Alan L. Balaran, Special Master, dated Sept. 30, 2003 (attached as Exhibit 5). Defendants have objected to the Special Master conducting his site visits ex parte because such authority was not conferred on him by either the August 12, 1999 Order or Rule 53. Motion for Protective Order at 3-6. Indeed, the Special Master agreed to notify Defendants' counsel prior to such site visits so that they could accompany him. See Letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Alan L. Balaran, Special Master dated Oct. 28, 2002 (attached as Exhibit 6). In their Opposition, Plaintiffs fail to point to any language in either the August 12, 1999 Order or in Rule 53 that grants the Special Master the power to conduct site visits ex parte.

C. Plaintiffs Have Failed To Establish Any Basis For Confinement

Even if it were assumed for the sake of argument that Defendants had violated the August 12, 1999 Order, Rule 37 provides no basis to confine any individuals for a violation of that order.

Rule 37(a)(4)(A) only provides for monetary sanctions. Rule 37(b)(1), which permits sanction only when a deponent fails to answer a question after being directed to do so by the Court, does not apply here. Rule 37(b)(2) also does not apply because the August 12, 1999 Order is plainly not "an order to provide or permit discovery" within the meaning of Rule 37(b)(2), but, instead, is an order referring authority to the Special Master pursuant to Rule 53. Plaintiffs fail to cite any basis other than Rule 37 for requesting the confinement of individuals to achieve "full compliance" with the Court's August 12, 1999 Order.

To the extent Plaintiffs' request for confinement can be interpreted as a request that the Court confine individuals as a sanction for contempt based on purported violations of an order, Plaintiffs have not, and cannot, establish a legal basis for either civil or criminal contempt. First, Plaintiffs have not alleged a violation of a clear and unambiguous order. "[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous,"

Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (quoting Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991)). Plaintiffs have failed to identify any order that clearly and unambiguously requires Defendants to permit the Special Master to conduct ex parte site visits, and there is none. Similarly, Plaintiffs also fail to identify any clear and unambiguous discovery order requiring Defendants to submit to discovery at this time, and there is none. Even if the Court had issued such orders, the requirements for civil contempt would still not be met because the Court never issued a conditional order finding individuals in contempt, threatening to impose sanctions, and defining purgation conditions. National Labor Relations Board v. Blevins Popcorn Co., 659 F.2d 1173, 1184-85 (D.C. Cir. 1981) (citing Oil Chem. & Atomic Workers Int'l Union v. NLRB, 547 F.2d 565, 581 (D.C. Cir. 1977)); see also

SEC v. Bilzerian, 112 F. Supp. 2d 12, 16 (D.D.C. 2000) (penalty should be imposed only after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions). For the same reasons that allegations of civil contempt fail, there is also no legal basis to impose confinement or any other sanction as punishment under the more stringent standards for proving criminal contempt. United States v. Roach, 108 F. 3d 1477, 1481 (D.C. Cir. 1997), vacated on other grounds, 136 F.3d 794 (D.C. Cir. 1998) (the court must find, beyond a reasonable doubt, that the person willfully violated a "clear and reasonably specific" order of the court) (citing United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993), and United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987)).

CONCLUSION

For these reasons, Defendants' Motion for a Protective Order should be granted, and Plaintiffs' Motion to Compel and Request for Sanctions should be denied.

Dated: November 24, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel

/s/ Timothy E. Curley

TIMOTHY E. CURLEY

D.C. Bar No. 470450

Trial Attorney

Commercial Litigation Branch

Civil Division

P.O. Box 875

Ben Franklin Station

Washington, D.C. 20044-0875

(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on November 24, 2003 the foregoing *Defendants' Reply in Support of Motion for Protective Order Regarding Plaintiffs' Request for Production of MMS Audit Documents and Plaintiffs' Notices of Deposition of Deborah Gibbs Tschudy and Lonnie J. Kimball with Request for Production of Documents And Opposition to Plaintiffs' Motion to Compel And Request for Sanctions Pursuant to Rule 37* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston